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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

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No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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Defendant in Error.

Smith-Brooks Press, Denver.

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STATEMENT OF CASE.

On March 22, 1902, the state of Colorado adopted an act requiring corporations to pay a state license tax of two cents in the case of domestic and four

cents in the case of foreign corporations, on every thousand dollars of capital stock.

The plaintiff in error, American Smelting & Refining Company, was incorporated under the laws of the state of New Jersey on the 4th day of April, 1899, and was then capitalized for the sum of $65,000,000.

On the 8th day of April, 1901, this corporation amended its certificate so as to increase its capital stock to $100,000,000, the par value of each share being $100.

On the 28th day of April, 1899, the company filed in the office of the secretary of state of the state of Colorado a copy of its charter, and paid therefor the fee of $9,792.50, under and by virtue of an act of the general assembly entitled, "An act concerning corporations," approved April 13, 1897.

On the 17th day of May, 1901, the company filed an amendment to increase its capital stock in the office of the secretary of state of Colorado, and paid therefor, as fees, the sum of $5,250, under and by virtue of an act of the general assembly entitled, "An act concerning corporations, etc.," approved April 6, 1901.

On the 21st day of May, 1901, the secretary of state executed and delivered to plaintiff in error a certificate of authority, under his hand and under the great seal of the state of Colorado, reciting and certifying that the company had paid all fees required by law, and that respondent was authorized to exercise any corporate powers provided for by law. This certificate was issued pursuant to section 491i, volume 3, M. A. S., Revised Supplement.

It only appeared necessary to examine two witnesses on the trial of this case.

Mr. Franklin Guiterman, the manager of the "American Smelting & Refining Company" in the state of Colorado, was produced by the company and examined as a witness. His evidence begins at page 39 of the record.

From this witness it appears: The company has seven smelters in Colorado; that its business consists in purchasing, smelting, reducing, refining and otherwise treating ores, minerals and metals and disposing of the products of such ores, minerals and metals; ores are shipped to the smelters in Colorado from mines in Utah, Idaho, Montana, California, Arizona, New Mexico, South Dakota, South America, Old Mexico and British Columbia.

The company "purchases outright the ores which it smelts." (Folio 86 of Record.)

The method of making these purchases is described by this witness in his direct examination as follows:

> "Q. Does your company purchase ores in states, territories and countries other than the state of Colorado, which are to be delivered to the respondent company by the sellers at the respondent company's plants in the state of Colorado? A. Yes, sir; it does.
>
> "Q. Are such ores so purchased, and contracted to be delivered, as referred to in my question, purchased and received by the respondent company at its plants in Colorado? A. In a large part, foreign ores are purchased in foreign territories, through local agencies, for which the cash is paid, and the transaction is completed there. The ores

are then shipped to Colorado by such agencies, on bill of lading, with draft attached.

"Q. But you do also contract for ores in other states, territories and countries outside of Colorado, whereby the contracts call for the delivery of the ores so purchased at your plants in Colorado? A. Yes, sir; to a considerable extent.

"Q. What portion of the ores purchased by your company and treated at its plants in Colorado come from other states, territories and countries outside of Colorado? A. Well, I should say, roughly speaking, about forty per cent., perhaps.

"Q. State whether or not ores containing valuable metals are shipped to the respondent company from points outside of the state of Colorado consigned to the respondent company, which, upon being received by the company at its plants in Colorado, are sampled and the value ascertained and paid for on that basis? A. Yes; there are such ores.

"Q. From what sources do they come? A. They come from the same states and territories that I have named.

"Q. Are there any other methods by which you purchase ores at points outside of the state of Colorado and receive them and smelt them in Colorado than those which you have testified to already? A. There are not."

* * * * * * *

CROSS-EXAMINATION.

"Q. I understand, then, Mr. Guiterman, that there are just two methods by which you obtain ores outside of Colorado; one is by the local agency existing in some of those states and territories, and foreign countries, determining the value of the ores in those states, territories and foreign countries, and it is paid for by shipping it to these plants in Colorado, with bill of lading attached, and paid for upon arrival here, isn't it? A. Yes, sir.

"Q. Now, you have no means of transportation of that ore from those points to your smelters here? A. It is foreign transportation, that is, by foreign companies.

"Q. That is done by foreign corporations that you have no interest or control over at all? A. Exactly.

"Q. And the shipment is from the foreign country wherever the mine is? A. Yes, sir.

"Q. To the plant in Colorado and the bill of lading ends there? A. It is either from the mine, General, or else from the sampling works in which the ore is sampled and then transmitted to the smelter, and value determined. If we settle there for it the value has to be determined by the same method of sampling that is used here; and draft is usually attached to the bill of lading.

"Q. And the destination of it is either the Denver smelter or some other smelting plant in Colorado? A. Denver or Leadville, or Pueblo.

"Q. After it is treated at the point in Colorado it is reshipped under a different bill of lading, made out in the name of a different owner? A. No—that is, you refer to the ore?

"Q. No; after it is treated? A. After the ore is treated the result, the product of that treatment, is base bullion or blister copper, which carries respectively gold, silver and lead, or copper, silver and gold; and those products are billed out to us to our refineries for further metallurgical treatment.

"Q. The consignor of this base bullion is the 'American Smelting and Refining Company?' A. Oh, yes; at some other point.

"Q. But the bill of lading from these foreign countries and states to a Colorado smelter is in the name of the owner of the ore to the American Smelting and Refining Company? A. Yes, if the owner of the ore has shipped it and drawn on the bill of lading, it is shipped by him to us.

"Q. It would necessarily be so if the bill of lading was attached, wouldn't it? A. Yes, sir.

"Q. It would be shipped in the name of the seller of the ore to the American Smelting and Refining Company? A. Of the seller of

the ore to the American Smelting and Refining Company.

"Q. And as I understand, in all these cases the value is determined where the mine is—at least, in the country where the mine is? A. Not always. It depends upon the arrangement. In the great majority of cases of foreign shipments the value is determined at the point of shipment. But in other cases it is determined here on arrival

"Q. Am I correct in the understanding that ores are shipped to the Colorado smelters from South America? A. Yes, sir.

"Q. British Columbia and Old Mexico? A. Yes, sir.

"Q. And several of the states which you have mentioned, and territories? A. Yes, sir; that is right.

(Second Method.)

"Q. And I also understand you that from some of the states the owners of the ore ship direct to the smelters? A. They do.

"Q. And you determine the value at the smelters? A. Yes, sir.

"Q. And then pay for it there? A. Pay for it here.

"Q. Pay for it here at the smelter. In that case the value of the ore is determined at the smelters in Colorado? A. Yes, sir."

When the ore is purchased in a foreign state Mr. Guiterman says it is shipped in the name of the seller

with the draft attached to bill of lading. The acceptance of this draft at the smelter and its payment completes the sale at the smelter. In the the other instance, where the mine ships direct to the smelter, the value of the ore is determined and the purchase made at the smelter. In either case the transfer of title is made at the smelter.

After the ore is treated, the product is shipped out of the state by the company to its refineries for further treatment. The consignor in this case is the American Smelting and Refining Company.

Mr. Guiterman further testified that the proportion of the Colorado property to the whole property is somewhere between ten and twenty per cent. of the whole; that the value of the plants in Colorado is close to $5,000,000 (folio 89, Record), while the assignments of error signed by the general counsel of the company adopts twenty per cent. (No. 29, page 68, Record.)

The company owns smelters and mines outside of Colorado, but no mines in Colorado. (Folios 89 and 93 of Record.)

Mr. C. W. Waterman testified for the company substantially as follows: That the company, previous to entering into business in the state of Colorado, complied with all the laws of the state.

NATURE OF THE TAX.

Counsel for plaintiff in error endeavored to have the annual state corporation license tax construed as a property tax, and then assail it, because,

as such property tax, they maintain it violates several provisions of the state and federal Constitutions.

The act of 1902 was an effort to increase the revenue of the state of Colorado and make the burden of the support of the state government fall upon new subjects of taxation, as the act afforded no reason for its creation unless such was the intent of its framers. For a general review of this act, discussing its purpose and construction, we refer to

Parsons vs. People, 32 Colo., 221.
Brown vs. Elder, 32 Colo., 527.

The revenue act of 1902 first provides for a tax upon all property real and personal; it then provides for a license tax upon liquor dealers; next a license tax upon the right to succeed to the property of a testator or intestate. After these, provision is made for the valuation of the intangible property of a corporation for the purpose of taxing it. We then come to the sections involved in this suit imposing a state license tax. This tax is undoubtedly assessed for the privilege of carrying on business; a corporation which is dormant does not have to pay it. The penalty shows the purpose of the law; a corporation must either pay the tax or cease to do business. It is assessed upon the face value of the stock, regardless of its value. Moreover, it is assessed upon the entire amount of the capital stock, whether it is invested in the state or outside of it.

The rate of taxation is different from that upon property, and shows that the legislature did not have the idea of property in view when it required the tax.

Section 65 reads as follows:

"Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the state of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this state, pay annually, on or before the 1st day of May of each year, or at the time of obtaining such right or privilege, and on or before the 1st day of May of each year thereafter, as the case may be, to the auditor of the state of Colorado, a state license tax as follows:

"Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations, the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

If we are to hold that this statute levies a property tax, it is because it is a franchise tax, and we have seen that all franchises of a corporation adding anything to its value are covered by previous sections of the act. Double taxation of property is not permissible in Colorado.

Board of Co. Comrs. vs. Wilson, 15 Colo., 90, 96.

It is not reasonable to presume that the legislature was in ignorance of the limitations in the Con-

stitution concerning taxation, and a review of the entire act shows that the intention of the legislature was to reach several new subjects of taxation in Colorado.

Counsel claim that the following sections of the state revenue act make the tax prescribed in section 65 a property tax:

> "Section 13. Whenever the terms mentioned in this section are employed in this act, they are employed in the sense hereinafter affixed to them.
>
> "The term 'real estate' includes, first, all lands or interest in lands within the state to which title or the right to title has been acquired from or ratified by the government of the United States, or from the state; Provided, That all lands purchased under contract taken from the state shall, during the life of the contract, be taxed only on the amount paid, including the improvements thereon. Second, all mines, minerals and quarries in and under the land, and all rights and privileges appertaining thereto; third, improvements.
>
> "The term 'improvements' includes all buildings, water rights, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.
>
> "The term 'personal property' includes everything which is the subject of ownership, whether tangible or intangible, and not included within the term 'real estate.'

"The term 'credit' includes every claim and demand for money, labor or other valuable thing, and every annuity or sum of money receivable at stated periods; but pensions from the United States, and salaries and payments expected for services to be rendered, are not included in the above term.

"The term 'intangible property' shall include rights, credits, franchises, special privileges and special advantages attendant upon or derivable under contract rights, having a value for the purposes of income or sale of itself, or in connection with other property.

"Section 14. Except where otherwise herein provided, the phrase 'taxable property,' as used in this act, includes real property, personal property, property that savors of both real and personal property, including rights and credits, and all intangible property as defined in the preceding section; and for the purposes of taxation it shall make no difference that the possession, use or ownership of any such property is qualified, limited, not the subject of alienation, or the subject of levy or distraint separately for the particular tax derivable therefrom; Provided, That where any property within this state is mortgaged, conveyed or pledged for the security of a loan or debt then owing, the said property and the notes, mortgage, deed of trust, trust deed, contract or other conveyance, shall be assessed as a unit, and as one and the same, and as of one value

and as the value of said property so mortgaged, pledged or otherwise conveyed only, and any such notes, mortgages, deeds of trust, trust deeds, contract or conveyance, shall not be otherwise returned or assessed.

"Section 15. All property not expressly exempt by law shall be subject to taxation. The term 'property,' as used herein, shall be held to include both tangible and intangible property."

Session Laws 1902, page 45.

Counsel for corporation claim that these sections make the privilege of doing business in the state of Colorado a property right. The intangible property, according to these statutes, includes rights, privileges, franchises, special privileges and special advantages.

When a foreign corporation files its charter in the office of the secretary of state of Colorado and complies with certain other laws governing its admission, it acquires the right to do business for a period of twenty years, subject, of course, to any law qualifying this right. This right to do business is a franchise or power.

But we insist that the corporation can not exert this right or power to do in any particular business and thus exempt the business from taxation. Business, trades or occupations are distinct subjects of taxation and are not included in sections 13 to 15, inclusive. The matters mentioned in these sections affect persons as well as corporations. No one would claim by virtue of these sections that an individual could escape paying a tax for the privilege of conducting a business, trade or profession, or that

a liquor dealer could escape paying a license tax. It is contended that sections 64 and 65 must be construed in entire disregard of the particular business in which the appellant is engaged; that these sections impose upon the corporation a tax on its abstract right to do business, separate and distinct from the actual business in which it is engaged.

A consideration of the language of those statutes does not sustain the view taken by plaintiff in error. The language of the statute is that the tax is collectible as a condition precedent to its right to do any business within the limits of this state, and the penalty is a forfeiture of this right to do business until the tax is paid.

Evidently the legislature had in mind the concrete business in which the corporation is engaged, and not the abstract power acquired by the filing of its charter. Therefore, the Supreme Court of the state of Colorado held

> "That the tax authorized by section 65 * * * is * * * a tax on the business of foreign corporations,"

and that it was levied for the purpose of state revenue.

SECTIONS 64 TO 69, INCLUSIVE, HAVE RECEIVED A REASONABLE CONSTRUCTION AND UNDER THIS INTERPRETATION THEY HAVE NO RELATION TO THE TAX IMPOSED IN OTHER SECTIONS OF THE ACT.

It is contended by plaintiff in error that intangible property "includes rights, credits, franchises, spe-

cial privileges and special advantages attendant upon or derivable from contract rights having a value for the purpose of income or sale of itself or in connection with other property."

Section 13 of the Session Laws of Colorado, 1902, page 46.

It is argued that the tax assessed in sections 64 to 69, inclusive, is, in reality, a tax upon the franchise of the corporation commonly designated and known as the power of a corporation "to do." If this interpretation is correct, then sections 61 to 63 prescribe a rule to appraise its value and it is assessed as property. For these sections of the revenue act of 1902, see appendices A. and B., respectively.

The rule is to find out the entire value of the corporation and deduct therefrom the value of the tangible property, and the difference is to be considered the value of the intangible property.

In Adams Express Co. vs. Kentucky, 166 U. S., 171, 180, this court said:

> "* * * it is plain that the legislature intended that the entire property, tangible and intangible, of all foreign and domestic corporations and all foreign and domestic companies possessing no franchise should be valued as an entirety, the value of the tangible property be deducted and the value of the intangible property thus ascertained be taxed under these provisions."

See, also,

Henderson Bridge Co. vs. Kentucky, 31 S. W., 491; *affirmed* in 166 U. S., 150.

It is unjust, therefore, to hold that sections 64 to 69 mean in reality a tax on intangible property, when sections 61 to 63, inclusive, expressly aim at this very result. It is not reasonable to suppose that the legislature intended to give a definition of property in sections 13 to 15, inclusive, which would render sections 64 to 69 meaningless and void. They are all parts of the same act enacted at the same session of the legislature, and all parts of the act should receive a reasonable construction which will allow them to stand.

Besides, sections 13 to 15, inclusive, contain only definitions, while sections 64 to 69 levy a special tax, and it would be a strange rule of construction which would allow definitions in the early part of the act to render void later sections of the same act imposing a specific tax.

Trades, occupations, professions and business are well recognized subjects of taxation, and if the legislature intended by sections 13 to 15, inclusive, to make them property and taxable as such, it would have made use of those well-known terms in those sections. The omission of them, and the enactment of sections 64 to 69 levying the tax on the right to do business within the state, make clear the intention of the legislature. The attempt of counsel to reduce the franchise "to do" of a corporation to an identity with the business in which it is engaged is not convincing. A natural person has the right "to be" and "to do," but in the case of corporations, these attributes are conferred, and are therefore taxable. But when the power "to do" of either a corporation or an individual is exerted in a specific business, the latter is taxable. The corporation has the right "to

be" in the state that creates it. It has a right "to do," under some restrictions, in every state. For instance, the West Publishing Company is selling books in every state in the Union without carrying its existence into other states, and they also enforce collections by the aid of courts. But when any particular corporation sets itself up in business in another state, it must comply with all the laws of the state concerning admission of foreign corporations. Certain privileges are enjoyable under the commerce clause of the Constitution, but this clause does not permit foreign corporations to enter a state for all purposes. What is "carrying on business" in a state, so as to render a corporation liable to pay a fee for admission, is decided in

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

The power of a corporation "to do" differs from the same power in natural persons in the respect that the charter defines what the corporations may do. With this difference, the powers are alike in natural and artificial persons. But when either puts the power in execution by starting any particular business, the latter is a distinct subject of taxation under sections 64 and 69, inclusive. The tax is assessed as a condition precedent to carrying on the business; it is the business which must cease as a penalty in case of default in the payment of the tax. The power "to do" is not taken away in case a natural person refuses to pay a tax imposed for the privilege of carrying on business; it is only suspended. The corporation acquired the right "to do" or to carry on business within the meaning of *Cooper Mfg. Co. vs. Ferguson, supra*, sub-

ject to all revenue laws then existing or which might thereafter be enacted. However, suppose the contention of counsel for plaintiff in error be correct, and that the tax imposed by sections 64 to 69, inclusive, is a property tax, it is not obnoxious to any constitutional provision of the state of Colorado or of the United States. Those sections would not be repugnant to any provisions of our Constitution. It is only when they are considered in connection with sections 61 to 63, inclusive, that an objection to one or the other arises, for the same thing would be taxed twice, once according to its value and then at an arbitrary rate.

Section 3, article X, Constitution of Colorado, provides:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxing all property, real and personal, * * *."

The limitation contained in this section requires the tax to be uniform only on the same class of subjects. For instance, all mining property might be taxed in one manner, railroad property in another, and real estate and personal property in still a different way, and this constitutional provision would not be violated.

People vs. Henderson, 12 Colo., 369, 375.

The power "to do" and the business of the corporation are distinct subjects of taxation.

> "The right or privilege *to be* a corporation or *to do* business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present."
>
> Home Ins. Co. vs. New York, 134 U. S., 594, 599.
>
> Adams Express Co. vs. Ohio, 166 U. S., 185.

> "Different modes of taxation are adopted in different states, and even in the same state at different periods of their history. Fixed sums in some instances are required to be annually paid into the treasury of the state, and in others a prescribed percentage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period."
>
> Home Ins. Co. vs. N. Y., 134 U. S., 594, 603.

> "The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is the right to exist in corporate form, without reference to the

powers that, under such form, the company may exercise. The distinction, although formulated by Mr. Justice Field in Horn Silver Min. Co. vs. New York, 143 U. S., 305, was not strictly adhered to in his subsequent expressions, probably because there was nothing in that case to call for a nice use of terms."

Lumberville Del. B. Co. vs. State Board, 25 L. R. A., 134, 138.

As illustrations of the method of taxing intangible property of corporations we refer to the following decisions.

"Owing to the difficulty of distinguishing between the capital and the property in which it is invested, tests for determining whether the tax is on the property or the franchises, may be regarded, generally, uncertain and unsatisfactory; yet its determination is often necessary, for, if a franchise tax, the property in which the capital is invested becomes immaterial. The usual and most certain test is whether the tax is upon the capital stock, *eo nomine*, without regard to its value, or at its assessed valuation in whatever it may be invested; if the former, it is a franchise tax; if the latter, a tax upon the property."

State vs. Stonewall Ins. Co., 89 Ala., 335, 338.

So a tax upon gross receipts is a franchise tax.

State vs. Phil. W. B. R. Co., 45 Md., 361.
U. S. Pow. Co. vs. State, 79 Md., 63.

So a tax upon deposits in savings banks.

Com. vs. People's Five Cent Saving Bk., 5 Allen, 428.
Prov. Inst. vs. Mass., 6 Wall, 611.

So a yearly tax proportioned to the amount of capital stock issued and outstanding.

State vs. Heppenheimer, 54 N. J. L., 439.

So a tax upon the number of tons of coal mined semi-annually by both domestic and foreign corporations is a franchise tax measured by the quantity of coal, and not a property tax upon the coal.

Kittanning Coal Co. vs. Com., 79 Pa., 100.

So a tax upon the amount of capital employed by a foreign corporation in the state is not a property tax, but upon the privilege extended to it of doing business therein as a corporation.

People vs. Wemple, 131 N. Y., 64.

The jurisdiction to impose such tax is gained by reason of the business which such corporation is privileged to do in the taxing state under the protection of its laws.

People vs. Roberts, 159 N. Y., 70, 74.

So in New York a tax computed by a certain percentage upon capital stock measured by dividends

was held valid against a foreign corporation when it does any business whatever in the state, without regard to the amount it does, or the amount of capital it employs, or the amount of its stock held therein, or the extent of the benefit derived from, or protection afforded by, the laws and agencies thereof.

Horn Silver Min. Co. vs. N. Y., 143 U. S., 305.

So, too, in New Jersey, a yearly tax of one-tenth of one per cent. on the amount of the capital stock held not a tax upon property, but a tax by way of a license for exercising corporate franchises.

Stand. Und. C. Co. vs. Attorney General, 46 N. J. Eq., 270.

It is the price of the right and privilege it received from the state of being a corporation. Although the amount to be paid is determined by the capital stock and the duration of the corporate life, yet these are only the *criteria* chosen by the legislature for ascertaining the probable value of the corporate franchise which the company assumed. It is not a tax levied upon corporate property or business.

Honduras Co. vs. St. Bd., 54 N. J. L., 278.

Followed and approved in

State vs. State Board, 61 N. J. L., 461.

However, counsel insist that the revenue act of Colorado makes these last forms of taxation property tax. These are well recognized methods of taxing franchises of corporations, and they remain valid forms of taxation even though the legislature has

made all sorts of franchises property. The constitutional clause invoked concerning uniformity only applies to subjects of the same class.

Ames vs. People, 26 Colo., 83.

People vs. Henderson, 12 Colo., 369.

Therefore, it would be appropriate for the legislature to call all sorts of franchises property, and at the same time to assess it arbitrarily upon the entire capital stock of the corporation, or in any one of the ways above designated.

The organic act creating the territory of Dakota provides that no law

> "shall be passed impairing the rights of a private property; nor shall any discrimination be made in taxing the different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

McHenry vs. Alford, 168 U. S., 651, 664.

Of the same purport is the case of

Postal Tel. Co. vs. Adams, 155 U. S., 688.

The legislature passed an act requiring railroads to pay a certain percentage on the gross earnings in lieu of other taxes. The Northern Pacific Railroad owned a great deal of land in the territory of Dakota, and it was insisted that it was a mere proprietor of land, the same as a natural person.

> "Many cases are cited, in the brief of counsel, from the different states having pro-

visions in their Constitutions somewhat similar to those found in the organic act of Dakota, and in which states it has been held that the legislature is not confined to taxation in precisely the same method for all classes of property, but that it has power to classify and to provide different methods of taxation of the property so classified. The particular facts arose in, and the cases are cited from, Wisconsin, Iowa, Kansas, Louisiana, Michigan, New Jersey, Pennsylvania, Mississippi, Missouri and Illinois. They are cited in the margin.

"Upon a full consideration of the subject, we are persuaded that there is nothing in any provision of the act of 1883 for the taxation of the gross earnings which violates the letter or the spirit of the organic act."

McHenry vs. Alford, 168 U. S., 651, 669-670.

The fourteenth amendment

"does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property."

Home Ins. Co. vs. N. Y., 134 U. S., 594, 606.

In *Giozza vs. Tiernan*, 148 U. S., 657, 662, Chief Justice Fuller remarked:

"Nor, in respect of taxation, was the amendment intended to compel the state to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. *Bell's Gap Railroad vs. Pennsylvania*, 134 U. S., 232; *Home Insurance Co. vs. New York*, 134 U. S., 594; *Pacific Express Co. vs. Seibert*, 142 U. S., 339; And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper vs. Texas*, 139 U. S., 462."

Whether we view this tax as a tax on property or on business, it is constitutional, unless it leads to double taxation. The legislature had power to classify all subjects of taxation. It has a right to adopt its own method of taxing each class. We have authority for taxing corporations for the privilege of carrying on business at a fixed rate upon their entire capital stock, regardless of its face value, and no matter how little property it has in the state.

Home Ins. Co. vs. N. Y., 134 U. S., 594.

Horn Sil. Min. Co. vs. People, 143 U S., 305.

Delaware R. R. Tax Cas., 18 Wall., 231.

Cal. vs. Pac. R. R. Co., 127 U. S., 1, 41.

Weston vs. Charleston, 2 Pet., 449, 466.
State Tax on Foreign-Held Bonds, 15 Wall., 300, 319.
Kirkland vs. Hotchkiss, 100 U. S., 499.

The amount of property in the state is immaterial.
Pembina Min. Co. vs. Penn., 125 U. S., 181.
Home Ins. Co. vs. N. Y., 134 U. S., 594.

In the trial of this case in the court below, counsel labored industriously to convince that tribunal that the expression "rights," "credits," "franchises," "special privileges" and "special advantages," in some mysterious manner, included the right to carry on business, taxed in section 65. But this is not the plain and obvious meaning of the statute.

In my judgment, these terms refer to something entirely different. For instance, a contract may become a subject of taxation, because it is an element of great value. Some express company may obtain a contract over a particular railroad and thus add to the wealth of the company. The Wells Fargo has a special charter obtained from the territory of Colorado. It is perpetual and allows that company to do almost any business, and is therefore of special value. In an early day, the city of Pueblo granted the Atchison, Topeka & Santa Fe Railway a right of way over certain streets. The growth of the city has extended far beyond these, and as a result this road possesses franchises of immense value. The Denver & Rio Grande Railroad, after a legal battle with the Atchison, Topeka & Santa Fe, obtained the right of way through the Royal Gorge in Colorado. It admits of only one road through the canon. This is by far the

best passage through the Rocky Mountains, and therefore the Denver & Rio Grande has a special advantage in the particular right thus obtained. Many other illustrations could be given to indicate the meaning and purpose of these phrases used in section 13 of our own act, but it is not necessary to extend the list.

Sections 13 to 15, inclusive, do not contain anything which requires the tax assessed by sections 64 to 69, inclusive, to be construed as a property tax. Even if the former sections did require such construction, the tax would not be unconstitutional as a property tax, for the reason that the legislature has the right to place that kind of property in a class by itself, and tax it by any just method. Many well recognized ways have been cited. But the construction of the Supreme Court of Colorado is reasonable and the operation of the law does not violate any provision of the federal Constitution, and, therefore, the rule adopted in this court will allow the interpretation of the highest court in the state to stand. Moreover, the rule in sections 61 to 63 for valuing the intangible property is worthless if the tax levied by section 65 is on the franchise or intangible property.

DECISION OF STATE COURT FINAL AS TO CONFLICT BETWEEN STATUTE AND STATE CONSTITUTION.

The decision of the Supreme Court of the state of Colorado is conclusive in this court as to any question of conflict between the statutes in controversy and the state Constitution.

Metropolitan St. Ry. Co. vs. N. Y., 199 U. S., 1, 35.

Adams Express Co. vs. Ohio, 165 U. S., 194, 219.

Bell's Gap R. R. Co. vs. Penn., 134 U. S., 232, 236.

Merchants' Bank vs. Penn., 167 U. S., 461, 462.

The decision in this case will be found in 34 Colo., 240, or 82 Pac., 531.

WHEN A STATE STATUTE IS ALLEGED TO INFRINGE SOME PROVISION OF THE FEDERAL CONSTITUTION, THE INTERPRETATION OF THE HIGHEST JUDICIAL TRIBUNAL OF THE STATE WILL BE ACCEPTED UNLESS, AS A MATTER OF FACT, THE STATE STATUTE, IN ITS OPERATION, VIOLATES SOME PROVISIONS OF THE FEDERAL CONSTITUTION.

When the matter comes before the Supreme Court on writ of error to the highest court of the state, only the federal question can be considered, and the court, in considering that question, is concluded by the construction of the state statute by the state court.

The legislature of Alabama passed a certain statute regulating the sale of fire and marine insurance within the state by companies not incorporated therein. It required such companies to pay annually into the treasury the sum of one hundred dollars. These statutes came before the Supreme Court of the United States in *Noble vs. Mitchell*, 164 U. S., 367.

Justice White, in concluding the opinion, at page 372, said:

> "This construction of the Alabama statute, although made by the Supreme Court of that state, it is urged is erroneous, and we are invited to disregard it; but manifestly the interpretation of a statute of the state of Alabama by the Supreme Court thereof under the circumstances here presented is binding on us."

It was charged that the statute violated the commercial clause and section 2, article IV of the Constitution, guaranteeing that "the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

The Supreme Court of Alabama, in interpreting the statute, held that the provision as to foreign corporations was distinct and separable from those concerning associations or partnerships. This court, therefore, refused to construe the statute, and held that the language, as interpreted by the state court, did not embrace partnerships or associations of persons, and that the practical operation given the statute in Alabama made it applicable to and enforceable against only foreign corporations.

On the other hand, in the case of *Yick Wo vs. Hopkins*, 118 U. S., 356, this court refused to accept the construction given certain ordinances of the city of San Francisco, because the practical effect and operation of these ordinances was to infringe upon certain provisions of the fourteenth amendment to the Constitution.

The state court held that these ordinances vested the board of supervisors with the power to withhold their assent to the use of wooden buildings as laundries in certain cases, with a view to the protection of the public against the dangers of fire. This court said:

> "There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. * * * The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."
>
> Yick Wo vs. Hopkins, 118 U. S., 356, 366.

As to whether the statute under which plaintiff in error filed a certified copy of its articles of incorporation constitutes a contract, exempting the corporation from the particular tax prescribed by section 65, this court will interpret that statute with a view to determine what the contract really is. But if the construction given to section 65 does not give to this statute a meaning which violates some provision of the federal Constitution, the interpretation will not be disturbed.

Justice Marshall has said:

> "The judicial department of every government where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no

court in the universe which proposed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the Constitution, laws or treaties of the United States."

Elmendorf vs. Taylor, 10 Wheat., 152, 159.

We quote from Justice McLean as follows:

"The decision of the highest judicial tribunal of a state should be considered as final by this court, not because the state tribunal in such a case has any power to bind this court, but because, in the language of the court in *Shelby vs. Guy*, 11 Wheat., 361, a fixed and received construction by a state in

its own courts makes a part of the statute law."

Green vs. Neal's Lessee, 6 Pet., 291, 298.

Chief Justice Fuller said:

"It is well settled that, upon the construction of the Constitution and laws of a state, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the federal Constitution or of a federal statute or a rule of general commercial law. *Norton vs. Shelby County*, 118 U. S., 425, 439; *Gormley vs. Clark*, 338, 348."

Stutsman County vs. Wallace, 142 U. S., 293, 306.

In *Noble vs. Mitchell*, *supra*, at page 372, Justice White said:

"* * * * when the statute is attacked upon constitutional grounds, it is our duty to avoid such a construction, if it can be done consistently, as will defeat the entire legislation of the state upon questions embraced in these statutes relating to insurance companies."

The following cases are also in point:

Osborne vs. Florida, 164 U. S., 650, 654.

Fallbrook Irr. Dist. vs. Bradley, 164 U. S., 112, 154, and citations.

Burgess vs. Seligman, 107 U. S., 20, 33.

Under the Constitution of the state of Colorado the legislature had the power to impose a business tax, and the highest court of the state has said this is the effect and meaning of the statute. The result inevitably follows that this construction of the statute should stand.

THE CONSTITUTIONAL PROVISIONS OF THE STATE CONCERNING UNIFORMITY AND LIMITATION OF TAXES APPLIES ONLY TO AD VALOREM TAX ON PROPERTY.

The portion of the state Constitution restricting the legislature in the imposition of taxes is found in article X of the state Constitution.

Our Supreme Court has held in four different cases that this article refers only to *ad valorem* tax on property.

Denver City Ry. Co. vs. Denver, 21 Colo., 350.

Parsons vs. People, 32 Colo., 221.

A. S. & R. Co. vs. People, page 57, record

Brown vs. Elder, 32 Colo., 527.

The point involved in the case of *Denver City Ry. Co. vs. Denver, supra*, was the power of the municipal corporation to assess the street railway company a

tax of ten dollars per annum for each street car it used to carry passengers.

In the case of *Parsons vs. People, supra*, the question involved was the authority of the state to collect a tax of twenty-five dollars from each drug store which sells liquor.

In these two cases, the tax was held to be an occupation or business tax, and not a license tax for police regulation.

Brown vs. Elder, supra, relates to inheritance tax.

THE STATUTES UNDER WHICH THIS CORPORATION WAS REQUIRED TO PAY A FEE FOR FILING A CERTIFIED COPY OF ITS ARTICLES OF INCORPORATION DO NOT CONSTITUTE A CONTRACT OF EXEMPTION FROM ANY FORM OF TAXATION.

Counsel seek to establish the proposition that the payment of the filing fee to the secretary of state and its acceptance made a contract between the state and the corporation whereby the latter obtained the right to do business within the state for a period of twenty years, exempt from any form of corporation tax except a tax on its property.

On the 28th day of April, 1899, the plaintiff in error filed a certified copy of its articles of incorporation with the secretary of state. It was then capitalized for $65,000,000, and paid for this filing the fee of $9,792.50. The law in force then was the act of 1897, found in chapter 51 of the Session Laws of that year. This act reads as follows:

"Section 1. Every corporation joint-stock company or association incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this state, having capital stock divided into shares, shall pay to the secretary of state, for the use of the state, a fee of ten dollars, in case the capital stock which said corporation, joint-stock company or association, is authorized to have, does not exceed fifty thousand dollars; but, in case the capital stock thereof is in excess of fifty thousand dollars, the secretary of state shall collect the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of certificate of incorporation, articles of association or charter of said incorporation, joint-stock company or association, in the office of the secretary of state; and, no such corporation, joint-stock company or association shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint-stock com-

pany or association, until said fee shall have been paid to him. But this act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes.

"Section 2. Any foreign corporation doing business in this state, that has, since the filing of its certificate in this state, increased its capital stock, without paying the fees prescribed by the law of this state at the time of such increase, or that shall hereafter increase its capital stock, shall be liable to pay the fees prescribed by this act, and it is hereby made the duty of the secretary of state to at once cause action to be brought against any foreign corporation for recovery of such fees, and a certified copy of the certificate of such increase, on file in any foreign state, shall be sufficient evidence to sustain a judgment for the amount of such fees, and an action in the nature of a writ of *quo warranto* shall lie against any foreign corporation to test its right to exercise corporate franchises in this state.

"Section 3. The secretary of state shall not file or record in his office any certificate of paid-up stock, certificate of impression of corporate seal or other paper of any corporation or association, nor issue any certificate to any corporation or association unless the articles of incorpation of said company are already on file in his office, nor unless all fees prescribed by this act shall have been paid."

In 1901, the capital stock was increased to $100,000,000. On the 17th day of May, 1900, the company filed with the secretary of state a certified copy of this amendment and paid therefor a fee of $5,250. The law in force at that time was the act of 1901, in relation to corporations, and is found in chapter 52 of the Session Laws of that year. The sections that are relevant to this issue are sections 4 to 10, inclusive. They read as follows:

> "Section 4. Every corporation, joint-stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or any state or territory of the United States, beyond the limits of this state, having a capital stock divided into shares, shall pay to the secretary of state, for the use of the state, a fee of thirty dollars in case the capital stock which said corporation, joint-stock company or association is authorized to have, does not exceed fifty thousand dollars; but in case the capital stock thereof is in excess of fifty thousand dollars, the secretary of state shall collect the further sum of thirty cents on each and every thousand dollars of such excess, and a like fee of thirty cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association or charter of said corporation, joint-stock company or association in the office of the secretary of state, and no such corporation,

joint-stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchises, rights or privileges, or be permitted to do any business or prosecute or defend in any suit in this state until the said fee shall have been paid.

"Sec. 5. Any foreign corporation, joint stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States, beyond the limits of this state, that has since the filing of its certificate in this state, increased its capital stock without paying the fees prescribed by the law of this state at the time of such increase, or that shall hereafter increase its capital stock, shall be liable to pay the fees prescribed by this act, and it is hereby made the duty of the secretary of state to at once cause an action to be brought against any foreign corporation, joint stock company or association for the recovery of such fees, and a certified copy of the certificate of such increase on file in any foreign state shall be sufficient evidence to sustain a judgment for the amount of such fees, and an action in the nature of a writ of *quo warranto* shall lie against any foreign corporation, joint stock company or association to test its right to exercise corporate franchises in this state, while so in default in payment of such fees.

"Sec. 6. Whenever any corporation, joint stock company or association, incorpor-

ated by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States, beyond the limits of this state, shall file with the secretary of state of this state certified copies of the general law of any foreign state or country, duly certified and authenticated by the proper authorities of such state, country or territory, as provided in general section 261 of the General Statutes of Colorado, 1883, the same being section 500 of Mills' Annotated Statutes of Colorado, such corporation, joint stock company or association shall pay to the secretary of state for the filing thereof, a fee of five dollars.

"Sec. 7. Whenever any such corporation, joint stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or of any state or territory o. the United states, beyond the limits of this state, shall file with the secretary of state a certificate designating its principal place of business or agent for the service of process, it shall pay to the secretary of state for the filing thereof, a fee of five dollars.

"Sec. 8. The secretary of state shall not file or record in his office any certificate of paid-up stock, certificate of impression of corporate seal, annual report or other paper of any corporation, joint stock company or association, nor issue any certificate to any corporation, joint stock company or association unless the articles of incorporation of said

company are already on file in his office, nor unless all fees prescribed by this act shall have been paid.

"Sec. 9. The secretary of state shall exact a fee of two dollars and fifty cents for filing and recording each certificate of impression of the corporate seal of any corporation, and a fee of two dollars and fifty cents for filing and recording each certificate of paid-up stock of any corporation; Provided, however, That where such certificate of paid-up stock shows that the capital stock of such corporation is in excess of fifty thousand dollars, that such corporation, joint stock company or association shall pay a further fee of five cents per thousand upon each thousand dollars of capital stock in excess of fifty thousand dollars for the filing and recording of said certificate of paid-up stock.

"Sec. 10. No corporation, joint stock company or association incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint stock

company or association, of all fees and taxes prescribed by law to be paid to the secretary of state, and every such corporation, joint stock company or association shall pay to the secretary of state for each such certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

Section 3, article XV, of the Constitution of the state of Colorado provides as follows:

"The general assembly shall have the power to alter, revoke or annul any charter or incorporation now existing and revocable at the adoption of this Constitution, whenever in their opinion it may be injurious to the citizens of the state, in such manner, however, that no injustice shall be done to the incorporators."

Section 9, article X, of the Constitution of Colorado provides:

"The power to tax corporations and corporate property, real and personal, shall never be relinquished or suspended."

Our legislature has wisely provided, as part of the act concerning corporations:

"The general assembly may, at any time, alter, amend or repeal this act, and shall at all times have power to prescribe such regulations and provisions as it may deem advis-

able, which regulations and provisions shall be binding upon any and all corporations formed under the provisions of this act; and, Provided, further, That this act shall not be held to revive or extend any private charter or law, heretofore granted or passed concerning any corporation."

Section 634, M. A. S.

This statute was adopted in 1877, and is found in the General Laws of that year.

On the 31st day of May, 1901, the secretary of state executed and delivered to the plaintiff in error a certificate of authority pursuant to section 491i, volume 3, M. A. S., Revised Supplement.

This document reads as follows:

"State of Colorado.

"Office of the Secretary of State.

"CERTIFICATE OF AUTHORITY.

"I, David A. Mills, secretary of state of the state of Colorado, do hereby certify that the American Smelting and Refining Company, under and by virtue of the provisions of 'An act relating to corporations, and prescribing certain fees to be paid by corporations, foreign and domestic, and to repeal certain acts and all acts, and parts of acts, in conflict herewith, approved April 6, 1901,' have made, signed, acknowledged, and this twenty-eighth day of April, A. D. 1899, at the hour of 11:30 o'clock a. m., filed in my office their certificate of incorporation.

"Now, therefore, pursuant to the provisions of section 10 of said act, I hereby certify that the said company has made full payment of all fees prescribed by law to be paid to the secretary of state, and due at the time of the issuing of this certificate, and is hereby authorized to exercise any corporate powers provided for by law.

"In testimony whereof I have hereunto set my hand and affixed the great seal of the state, at the city of Denver, this twenty-first day of May, A. D. 1901.

(Seal of the state of Colorado.)

"DAVID A. MILLS,

"Secretary of State."

A copy of the statute authorizing the issuance of this certificate is found in the appendix at "C."

Two propositions are made plain by a consideration of these statutes and the constitutional provision cited: First, there is no suggestion of an exemption from taxation in any statute bearing upon the filing of the certified copy of the articles of incorporation. Second, the constitutional provision prohibits the legislature from exempting a corporation from any form of taxation.

The charter may constitute a contract between the state granting it and the company. Even if it contain a clause exempting it from taxation in the parent state, the filing of a certified copy in another state would not constitute a contract of exemption. The fact that an additional tax is imposed on a person or corporation is not a change or alteration of the contract. Among the laws most likely to be enacted

after its creation were those changing and altering the revenue laws, adding new subjects of taxation, or changing the burden of existing revenue laws. The general statute reserving the right in the legislature to amend or repeal the laws pertaining to corporations is constitutional. But the right to change the revenue laws exists regardless of this statute or constitutional provision.

Griffin vs. Ins. Co., 1 Am. Corp. Cases, 530.
Tomlinson vs. Branch, 15 Wall., 460.

We have seen that the right to do business is subject to taxation. If we are right in this assertion, then the Constitution prohibits the legislature making any contract of exemption with corporations. This provision of the Constitution, in my judgment, effectually disposes of the contention of plaintiff in error. The legislature can not make a contract with a corporation, express or implied, that would exempt it from any of the ordinary forms of taxation. We believe that the authorities abundantly demonstrate that corporations are subject to a tax upon their property, real and personal, upon their franchises, and upon the privilege of carrying on business. A corporation may also be required to pay a tax for its shareholders upon the stock owned by them. If a person is liable to pay a tax for the privilege of carrying on business, a corporation is subject to the same form of taxation. If the legislature, at the time of admitting this corporation, had not seen fit to tax the business carried on by the corporation, there is certainly no contract agreeing never to resort to this form of taxation. If the legislature had attempted to exempt it from any

kind of taxation, the act would be void, because of the constitutional provision cited. A corporation claiming to be exempt from any form of taxation must show a clear and unequivocal provision to that effect, either in its charter or under the general law under which it is incorporated.

Ohio Trust Co. vs. Debolt, 16 How., 416.

Delaware R. R. Tax Case, 18 Wall., 206.

North. Missouri R. R. Co. vs. Maguire, 20 Wall., 46.

Metropolitan St. Ry. Co. vs. N. Y., 199 U. S., 1.

Wells vs. Savanah, 181 U. S., 531.

Bank vs. Billings, 4 Pet., 514.

Memphis Gas Co. vs. Shelby Co., 109 U S., 398.

In *Wells vs. Savanah, supra*, at page 539, the court said that a contract of exemption from taxation must not only be founded upon a consideration, but it must be clearly stated, and will not be inferred from facts which do not irresistibly point to the existence of a contract.

The revenue act of 1901 and the revenue act of 1902 make it plain that the legislature did not intend the fee paid to the secretary of state to stand in lieu of the frachise tax or a tax on business. The Session Laws of 1901 contain an act concerning the fees to be paid for the organization of corporations and the admission of foreign corporations. Then, in the same volume, we have the revised revenue act of 1901, which was re-enacted in 1902 without material change, be-

cause of the failure of the legislature to pass it constitutionally in the previous year.

The fee which the American Smelting and Refining Company would be required to pay under the present law would be $30,015. But under the law of 1897 and that of 1901, which were in force at the time of the filing of its articles of incorporation, the fee was $15,002.50.

Now, we will assume that if the people of the various states are willing to allow persons to form themselves into gigantic corporations, then it is just and proper that the latter should pay at least as much on the dollar for this privilege as the small concerns are required to pay. These corporations are merely availing themselves of a law which did not have them, or similar organizations, in view when it was framed, and if the latter have power to take advantage of the law on equal terms with small corporations, they should at least have the good grace to do so, without seeking to import to the law a new and different construction than was intended by its framers. There is no extra force to be implied from the size of the fee when we observe the magnitude of the larger corporation, and know that it pays only the same proportionate fee as the smaller concern pays.

It was entirely optional with this company whether it should incorporate for one hundred millions of dollars or five millions. Mr. Guiterman testified on the stand that the entire smelting plant of the American Smelting and Refining Company in the state of Colorado could be duplicated for the latter sum, but, for some reason or other, this company has seen fit to enlarge its scope and swell its capital

until it has been able to dominate the entire smelting industry of the United States. It would not be to its advantage to have separate corporations for different states. That plan would not control the smelter business. It, therefore, pays for the advantage which it enjoys, but it should be content to limit the payment to that one object. Indeed, the profit arising from the sale of watered stock is confined to those corporations which issue an enormous volume of stock. There is every reason why these corporations should pay a very much larger fee for the privilege of filing their articles and deriving from the government the vast power which they enjoy than the smaller concern which is organized for the beneficial protection of those who are fairly and honestly conducting a private business under the protection of a corporation.

The fee which a foreign corporation pays to file its articles in a state is analogous to the filing fee paid by a domestic corporation. Appellant contends that this is a purchase price and that the state has sold something. This is purely an assumption, and not a single authority is cited to sustain it. The case at bar is not like those corporation cases referred to by counsel, where the state, impelled by the necessity of raising revenue, and expressly avowing its intention, has sold a franchise for the purpose of raising certain revenue, and inserted a clause of exemption from other taxation as an inducement to the buyer.

We are now confronted with something entirely different. The legislature has enacted certain general statutes which are merely ordinary laws controlling the formation of corporations, and there is no sale expressed in the terms of any of these statutes.

An ordinary corporation with a capital of one million dollars would pay only a trifling fee for the privileges granted under these statutes. If the ambition of modern promoters is driving them to the formation of colossal organizations, with an accumulation of capital that would have been incredible to the business man of a quarter of a century ago, and the organization has been attained under the simple and ordinary statutes of the state, it is vain to contend that, because the fee aggregates a large sum, something has been purchased from the state, when, in truth, the state has never had in mind the sale of anything. The charge being simply an ordinary fee for filing the papers, as in ordinary cases, the rule is not different if the capital stock is increased until the fee becomes large.

There is an obvious distinction between the charter of a corporation or the general statutes under which corporations file their articles, which are legislative in character and subject to alteration, amendment or repeal in pursuance of the Constitution and statutory provisions; and business contracts, or franchises, entered into between corporations and the state or municipality. The latter is protected by all the provisions of the federal Constitution, the same as a contract between two natural persons. But articles of incorporation filed under the constitutional provisions and statutes, such as we have cited in Colorado, are legislative in character and are subject to change from time to time.

Walla Walla vs. W. W. W. Co., 172 U. S., 1.

Joplin vs. Light Co., 191 U. S., 150.

Where the business contract between the corporation and the state or city clearly exempts the company from any burden of taxation, the exemption will be enforced, and no subsequent statute can impair the contract. There are many decisions of this character which lay down the doctrine that the original sum paid for the franchise exempts the company from any further burden of taxation, but these cases are easily distinguished from the one before us.

A TAX MEASURED BY A FIXED PER CENT. ON THE CAPITAL STOCK OF A CORPORATION FOR THE PRIVILEGE OF CARRYING ON BUSINESS IS NOT AN ILLEGAL DISCRIMINATION, BECAUSE NATURAL PERSONS ARE NOT LIABLE FOR SUCH TAXES.

Sections 64 to 69, inclusive, are said to violate the equality clause of the fourteenth amendment, because it is declared that corporations pay a tax for the privilege of carrying on business, while natural persons are not required to bear this burden. It is assumed that corporations and natural persons carry on business under the same circumstances and conditions. Herein lies the distinction, in our opinion.

Justice Field, in *Barbier vs. Connolly*, 113 U. S., 27, 31, said that the fourteenth amendment, in declaring that no state shall deprive any person within its jurisdiction of the equal protection of the laws, meant that

> "no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits of others under like circumstances; that no greater burdens should be laid upon the one than are laid upon others in the same calling and condition."

We believe there are essential differences between the person who carries on a business and the corporation which carries on a business. The most noticeable distinction is the capacity of a corporation to do business in an adopted name, to sue and be sued in that name, the power of succession and perpetuation, the facility with which natural persons can enter or retire from the company without interference with the continuation of the business, and the exemption of this artificial person from many liabilities to the government and public which the individual must bear. For instance, every citizen is liable to jury and military duty; also he may be compelled to serve as a member of a *posse comitatus*, and is generally required to pay a poll tax. The entire property of an individual is liable for the debts of the business he carries on. Moreover, his future acquisition may be levied upon to pay his debts, while an insolvent corporation usually winds up its affairs and becomes extinct. The right to do business in the name of a corporation, to elect directors, to do business through a manager, president or other officer; to issue stock and sell it, and in this manner to raise money for promoting an enterprise—these are all benefits conferred by the state upon a corporation, and they are among the valuable powers acquired by incorporating, which have gone so far toward making corporations numer-

ous. In some instances the individual is liable to imprisonment for violation of law committed in the conduct of his business, while a corporation, for the same offense, is liable only to a fine.

> "Considering that corporations have privileges and franchises from the state which individuals do not possess, they may be taxed differently from individuals and by a different process."
>
> Brannon on the Fourteenth Amendment, page 340.

> "An excise tax may also be imposed on corporations to compensate the state for the additional burden sustained by the state and the people, by reason of property being held in artificial bodies, the persons comprising such bodies being exempt from liability to a great extent for the debts thereof. This ground of excise taxation was recognized in *Adler vs. Whitbeck*, 44 Ohio St., 539, and was there applied to the liquor traffic, because that business was there shown to impose additional burdens upon the state. So the aggregation of capital by corporations imposes additional burdens, and requires regulations not applicable to individuals."
>
> So. Gum Co. vs. Laylin, 66 Oh. St. Rep., 578, 595.

I quote from the opinion of Justice McKenna in *Magoun vs. Ill. T. & S. B.*, 170 U. S., 283, 294:

> "And Mr. Justice Brewer, in Gulf, Colorado & Santa Fe Ry. vs. Ellis, 165 U. S., 150,

> 165, after a careful consideration of many cases, said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

A law estimating the value of express companies and railroads within a state by arriving at the value of the whole plant as a unit and apportioning to the state an amount in proportion to its mileage within the state, is not an unjust discrimination, or a violation of the rule of classification, although different from the method of valuing other property within the state.

> Adams Express Co. vs. Ohio, 165 U. S., 194.
>
> American Express Co. vs. Indiana, 165 U. S., 255.

It is true that

> "There is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impar-

tially to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroads and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose."

Kentucky Railroad Tax Cases, 115 U. S., 337.

Colorado has provided by law that mining property shall be valued for the purpose of taxation at twenty per cent. of the gross output.

People ex rel. vs. Henderson, 12 Colo., 369.

Also has classified mining property into non-producing, those that produce $1,000 or less, and those that produce over $1,000, and the last two are taxed very differently.

People ex rel. vs. Henderson, 12 Colo., 369.

"Nor is the objection tenable that the statute, in imposing such tax, conflicts with the last clause of the first section of the fourteenth amendment of the Constitution of the United States, declaring that no state shall deprive any person within its jurisdiction of the equal protection of the laws. It is con-

ceded that corporations are persons within the meaning of this amendment. It has been so decided by this court. Pembina Cons. Silver Co. vs. Pennsylvania, 125 U. S., 181. But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class."

Home Ins. Co. vs. N. Y., 134 U. S., 594, 606-607.

A revenue statute which places railroads, express companies and telegraph companies in one class for the purpose of levying a tax in a form peculiar to such corporations, was held not to violate the clause of federal Constitution concerning equal protection.

Adams Express Co. vs. Ohio, 165 U. S., 194.

In *Home Ins. Co. vs. New York*, 134 U. S., 594, and *Horn Silver Mining Co. vs. N. Y.*, 143 U. S., 306, a statute imposing a tax on the corporate franchise, or the business of every corporation, joint stock company or association, to do business in the state, was sustained.

An examination of these cases shows that the individual may conduct a business without liability for the same tax.

McHenry vs. Alford, 168 U. S., 651, 673, decided that railroads might be assessed and taxed on property in one manner and individuals in another. In this case it was held that the property of railroads, including large grants of land from the government, might be classified by itself for the purpose of taxation.

In *Postal Telegraph Co. vs. Adams*, 155 U. S., 688, it appears the tax required to be paid by the telegraph companies in Mississippi was three thousand dollars on each telegraph company operating within the state one thousand miles or more of wire, and on each telegraph company operating less than one thousand miles of wire, a tax of one dollar per mile, and the tax thus levied was in lieu of other state, county and municipal taxes.

Chief Justice Fuller, in rendering the opinion, said:

> "The act, in prescribing the ascertainment of the charge as to telegraph companies operating less than one thousand miles of wire, was directed to reach a reasonable commutation of the amount which the company would be compelled to pay if the taxation were *ad valorem*. The taxation was neither arbitrary nor discriminating * * *."

Postal Tel. Co. vs. Adams, supra, 698.

In this case the tax was imposed only on corporations owning and operating telegraph lines in the state, and a great difference was made between lines consisting of a thousand miles or more, and those consisting of less mileage.

For the purpose of levying a tax on the business of corporations the statute of Colorado divides them into two classes—domestic and foreign—and imposes upon the members of each class a tax which is uniform as to all the constituents. It is sufficient that the tax imposed is uniform and equal as to all the members of the class upon which it operates.

State Railroad Tax Cases, 92 U. S., 575, 611.

People vs. Henderson, 12 Colo., 369.

In 1879 the state of Pennsylvania passed an act requiring all foreign corporations, with certain exceptions, to pay into the state treasury one-fourth of a mill on each dollar of the capital stock.

The constitutionality of this act was contested and the tax sustained in *Pembina Min. Co. vs. Penn.*, 125 U. S., 181.

Section 64 levies a tax of two mills on each thousand dollars of the capital stock of domestic corporations, while section 65 levies a tax of four mills on each thousand dollars of the capital stock of foreign corporations.

It is claimed by plaintiff in error that this is an arbitrary discrimination between foreign and domestic corporations and is in violation of the provision of the fourteenth amendment of the federal Constitution, which prohibits any state from depriving any person within its jurisdiction of the equal protection of the law. It has been held that a corporation is a person within the meaning of this provision. It is also claimed that this classification is in violation of the fourteenth amendment because it violates the clause of the Constitution guaranteeing to the citizens of each state all the privileges and immunities of the citizens in the several states.

As to the latter clause, corporations are not citizens within its meaning.

> Pembina Min. Co. vs. Penn., *supra*.
>
> Paul vs. Virginia, 8 Wall., 168.

Mr. Justice Field said:

> "The equal protection of the law which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires

is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more. The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided, always, such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the state of its creation, that other states may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states, the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character."

Pembina Min. Co. vs. Penn., *supra*, page 189.

But it is asserted by plaintiff in error that it has been admitted into the state of Colorado and has paid the regular fee for that purpose and has obtained

the privilege of doing business in the state for twenty years, and that, therefore, it is entitled to the equal protection in carrying on its business which other corporations or persons similarly situated, enjoy. For instance, a domestic corporation may carry on smelter business and pay only two cents on each thousand dollars of its capital stock.

> "The power of the state to discriminate between her own domestic corporations and those of other states, desirous of transacting business within her jurisdiction, is clearly established in the case we have referred to, as it also had been in the previous case of *Augusta vs. Earle*. As to the nature or degree of discrimination, it belongs to the state to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."
>
> Ducat vs. Chicago, 10 Wall., 410, 415.
>
> Copper Co. vs. Scherr, 50 W. Va., 533, 551.
>
> State vs. Underground Cable Co., 18 Atl. R., 581.
>
> Augusta vs. Earle, 13 Peters, 519.

A foreign corporation admitted to do business in another state is subject to all the powers of taxation which may be exercised. The state has a right to select such subjects of taxation as it deems best, and among these are business and occupations. The state possesses the further right to classify when it fixes this tax. The only limitation upon this power is the

prohibition against the arbitrary exercise of it. Corporations may be classified in accordance with the business they transact.

On the other hand, they may be aggregated into those which are domestic and those which are foreign, if there is any just discriminating principle distinguishing them. When a corporation is admitted to do business in another state, it does not cease to be foreign. It still possesses the right, when sued, in this state, to demand a transfer of the suit to a federal court, because it is a foreign citizen. The question, therefore, remains to be determined, if the element of foreign citizenship is a just and reasonable basis of classification for revenue purposes. There are positive objections to the entrance of foreign corporations into a state, and it is only the exercise of reasonable discretion on the part of the legislature to assess an additional tax for this additional burden. The objection, as well as the advantage, of foreign corporations entering another state, is well illustrated in the case of the American Smelting and Refining Company. It would not be to its advantage to have separate corporations for different states; that plan would not control the smelter business. If separate corporations were employed, an unlawful combination would have to be effected in order to obtain the monopoly. It is well understood that these great corporations, controlling one entire business in different states, is a menace to the enforcement of law, and the attainment of wholesome legislation. They become a burden to the body politic.

The power which foreign corporations acquire of doing business in another state enables them to gain control of that particular business in various states,

and in this respect the people are exposed to the danger of gigantic corporations which, in their operations, amount to the same thing as trusts. A corporation has been able to gain control of an entire business by means of the laws of the various states allowing it to enter and do business. It gains a decided advantage over domestic corporations. Of course, every corporation is domestic in some state, but the privilege of migrating to other states, as we have endeavored to illustrate, confers the advantage pointed out. Those which avail themselves of it obtain the special benefit and power.

Moreover, the business is conducted by a foreign citizen; the charter is the gift of another state, and is under its control; a foreign corporation is represented only by an agent, appointed pursuant to law. If foreign corporations are dealt with on an equal basis with domestic corporations, all the business carried on in the state might fall into the hands of foreign corporations, and the state would be at the disadvantage of having her property owned and her business conducted by artificial persons, entirely beyond the limits of her jurisdiction. We think, therefore, that this classification for revenue purposes is reasonable and just. Those decisions which apply to unjust discriminations between natural persons are not in point.

The opinion of Chief Justice Field, in *Barbier vs. Connolly*, 113 U. S., 27, 31, is usually referred to as the best exposition of what is meant by that clause of the fourteenth amendment guaranteeing to persons the equal protection of the law.

"The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace,

morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some, and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Id., 27, 31.

"Is the act open to this criticism? The clause of the fourteenth amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been, and probably never can be, precisely defined. Generally, it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.'"

Magoun vs. Ill. T. & S. B., 170 U. S., 283.

Kentucky Railroad Tax Cases, 115 U. S., 321, 337.

Billings vs. Illinois, 188 U. S., 97.

American Sugar Refining Co. vs. Louisiana, 179 U. S., 89, 94.

Missouri Railroad Co. vs. Mackey, 127 U. S., 205.

We believe there is a clear distinction between the power to classify for the purpose of raising revenue, and the right to discriminate between persons and corporations in declaring certain acts criminal. This distinction is well illustrated in the following citation:

"A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade

rights secured by the Constitution of the United States. But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it can not divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of the government, and, at the same time, indirectly to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute, making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

Connolly vs. Union Sewer Pipe Co., 184, U. S., 540, 562.

Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79 .

It is also claimed that there is an unjust and illegal discrimination in the exemption of corporations having less than twenty-five thousand dollars capital. This contention is effectually disposed of in

Magoun vs. Ill. T. & S. Co., 170 U. S., 283.
Billings vs. Illinois, 188 U. S., 97.

Then plaintiff in error complains that there is an unreasonable discrimination in the classification of foreign corporations. A portion of section 65 provides as follows:

> "Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations, the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

The practice has been somewhat frequent of late years of organizing companies—particularly mining companies—with stock having a face value of one cent, five cents, or some other amount less than one dollar. Where the law permits this to be done, the object is usually to avoid paying a heavy organization fee, or in some manner to reduce taxation. The value of a share depends on the number of shares, and not on the face value. The promoters expect to obtain an advantage by making the par value of stock less than one dollar. The legislature in such cases has the right to make the tax depend on the number of shares instead of the par value of each share. Classi-

fication based on this reasonable discrimination was sustained in

Postal Telegraph Co. vs. Adams, 155 U. S., 688.

Magoun vs. Ill. T. & S. B. Co., 170 U. S., 283.

DUE PROCESS OF LAW.

Our statute provides that on the first day of May, annually, each corporation shall pay a "state license tax" apportioned to its capital stock.

It then provides that if such corporation fails to pay this tax it shall forfeit its charter, if a domestic corporation, and its right to do business in the state if a foreign corporation, and shall not be permitted to prosecute any suit, etc. But, before this penalty can be enforced, the statute requires that the auditor shall, within sixty days after the first day of May, serve it with notice of its failure, and provides that it may be able to pay this tax within six months and regain the right to do business, and this is "due process of law," and affords to every one the protection required under the fourteenth amendment to the Constitution of the United States, and is within the decision of Justice Miller in the case of

McMillan vs. Anderson, 95 U. S., 37, 40.

This action is in the nature of a *quo warranto*. We are not seeking in this suit to prevent the defendant from having its day in court before its right to do business is forfeited. Section 66 says that

> "The fact of such failure may be pleaded and maintained as an absolute defense to any and all suits or proceedings in law or equity brought or maintained by or on behalf of such corporation in any court of competent jurisdiction within the limits of this state until such tax is paid."

I see no reason why the state may not deny to the creature it produces the processes of the state when it refuses to obey its law and contribute to the support of the government the tax imposed by the state in any constitutional way. The support of the government is a condition precedent to the right of its protection.

It is not necessary to digress into a consideration of this section as to whether the penalty of these sections is self-executing. A *quo warranto* proceeding may be necessary if the state wishes to forfeit the charter, but in the case before us the statute only suspends the business until the tax is paid.

We have chosen to proceed against this corporation by a direct proceeding, and, therefore, the objections made to this part of the law are not material.

It is a well settled principle of law that where separate and distinct paragraphs of a statute can be separated and given force and effect without the adoption of the remainder, the court may sustain the good and declare invalid the bad.

It is enough to sustain this action of *quo warranto* that sections 64 and 65 of the statute fix the obligation of the corporation. The tax can be collected in an action of debt even if the penal statutes fail. Sections 67 and 68 fix the procedure in case of failure of the corporation to comply with this obliga-

tion. If the corporation persists in a determination to do business, regardless of its obedience to the law, then it is an appropriate remedy on the part of the state of Colorado to proceed against it by *quo warranto*. The constitutionality of section 66 can only be raised when suit is brought by the American Smelting and Refining Company and some defendant undertakes to plead that it is not in a position to sue at law or equity, for the reason that it has failed to pay the license tax.

> "Taxes are not, as a general rule, collected by judicial proceedings, and the procedure resorted to for their imposition and collection may be properly regarded as due process of law if it conforms to the customary usage."
>
> Wulzen vs. Board, 40 Am. St. R., 18.
>
> McCullough vs. Maryland, 4 Wheat., 317.
>
> Fallbrook vs. Bradley, 164 U. S., 113.

> "Process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taxing private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages."
>
> Bell's Gap R. R. Co. vs. Penn., 134 U. S., 232, 239.
>
> Palmer vs. McMahon, 133 U. S., 660.

> "Of the different kinds of taxes states may impose there is a vast number of which,

from their nature, no notice can be given the taxpayer; nor would notice be of any advantage to him; such as poll taxes, licenses, taxes (not dependent on extent of business), and generally specific taxes on things, persons or occupations. In such cases the legislature, in authorizing the tax, fixes the amount, and that is the end of the matter. If the tax is not paid, property may be sold and the owner be thus deprived of it. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is thereby invaded. Thus, if the tax on animals be fixed at a sum per head, or on articles at so much per yard, bushel or gallon, there is nothing the taxpayer can do to affect the amount to be collected from him. So if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping hotel or restaurant, or selling liquor, cigars or clothes, he has only to pay the amount required by law. There is no need in such case for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in a state, or on domestic corporations for franchise, the parties have only to pay the amount. In such cases there is no need for notice or hearing, as the amount would not be changed. But where a tax is levied on prop-

erty not specifically, but according to value, to be ascertained by assessors, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessment. The law in prescribing the time when such complaint will be heard gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax is not paid, by a sale of the delinquent's property, is due process of law."

Hager vs. Reclamation District, 111 U. S., 709.

Kentucky Railroad Tax Cases, 115 U. S., 321.

SIMILAR CASES.

A principle similar to the one involved in the Colorado statute runs through the following cases. In each of these cases an annual state corporation license tax was sustained and very many of the questions raised in this case were argued and passed upon. In most of these cases the tax was declared to be a business or occupation tax and was levied upon corporations for the right to do business as a class sepa-

rate and distinct from natural persons. In short, nearly all the questions raised in this case were passed on in these decisions:

Memphis G. L. Co. vs. Shelby Co., 109 U. S., 398.

Lumberville Del. Bridge Co. vs. St. Bd., 25 L. R. A., 137.

Copper Co. vs. Scherr, 50 W. Va., 533.

Capital City W. Co. vs. Bd. Rev., 117 Ala., 303.

Stand. Und. Cable Co. vs. Atty. Gen., 46 N. J. Eq., 270.

State vs. Underground Cable Co., 18 Atl., 581.

Southern Gum Co. vs. Laylin, 66 Oh. St. Rep., 578.

Home Ins. Co. vs. New York, 134 U. S. Rep., 594.

Adams Express Co. vs. Ohio, 166 U. S., 185.

Horn Sil. Min. Co. vs. N. Y., 143 U. S., 305.

State vs. Auburn School, 58 L. R. A., 110.

Phoenix Carpet Co. vs. State, 22 So. Rep., 627.

Atty. Gen. vs. Bay State Min. Co., 99 Mass., 148; 96 Am. Dec., 717.

State vs. Stonewall Ins. Co., 89 Ala., 335.

Lumber Co. vs. Ward, 30 W. Va., 43.

INTERSTATE COMMERCE.

We have printed all the material evidence in the first part of the brief relating to the interstate commerce business of defendant. The question arises whether or not the business of The American Smelting and Refining Company is interstate commerce.

Suppose a flour mill is erected at Greeley, Colorado, and wheat shipped to it from Kansas, Nebraska and Wyoming is ground into flour which is afterwards shipped to Chicago to be marketed—would the business of running a flour mill at Greeley be interstate commerce?

Suppose the Colorado Fuel and Iron Company, with its great plant at Pueblo, receives iron ores from Montana, Utah and Nevada, and manufactures them into steel rails, which it sells under contract to the various railway companies throughout the world—is the business of manufacturing steel rails at Pueblo interstate commerce?

And so, the particular business of The American Smelting and Refining Company is the receiving and treatment of ores and the extraction of the precious metals therefrom, and the product is then shipped to other plants, where it can be refined.

The flour mill may send its agent into any of the neighboring states to contract for the shipment of wheat, and if it does so, no tax can be levied upon the right to enter another state and purchase wheat, nor upon the transportation of the article, nor upon the article while in transit. But this does not prevent the taxation of the flour mill at Greeley as property, nor the taxation of the occupation of grinding wheat

into flour. And so, The American Smelting and Refining Company can not be taxed for sending its agents into other states to purchase ores.

> "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."
>
> County of Mobile vs. Kimball, 102 U. S., 691, 702.
>
> 2 Tucker's Cons. U. S., 534, 535-536.
>
> Gibbons vs. Ogden, 9 Wheat., 189, 227, 229.

> "Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said,

intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which said commerce may be conducted. Welton vs. Missouri, 91 U. S., 275; Mobile Co. vs. Kimball, 102 U. S., 691; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196; 5 Sup. Ct., 826; Hooper vs. California, 155 U. S., 648, 653; 15 Sup. Ct., 207; U. S. vs. E. C. Knight Co., 156 U. S., 1; 15 Sup. Ct., 249."

Hopkins vs. U. S., 171 U. S., 578.

Transportation of grain does not become interstate commerce if in the course of shipment from a point in another state into the state of New York it is required to pay storage in an elevator and it is not taken by the first carrier on a through bill of lading. That is, if the storage in the elevator is only incidental to its transportation and the bill of lading is through to destination, then it is interstate commerce; but if the shipment is not marked for this course of procedure, then it is not interstate commerce. I believe this case is decisive of some of the points attempted to be settled by the evidence in the case before the court.

U. S. vs. Lehigh Val. Ry. Co., 26 Am. & Eng. R. R. Cases, 682; 115 Fed. Rep., 373.

Kelley vs. Rhoads, 188 U. S., 1.

Coe vs. Errol, 116 U. S., 517.

Munn vs. Illinois, 94 U. S., 113.

The Daniel Ball, 10 Wall., 565.
Wabash Ry. Co. vs. Ill., 118 U. S., 557, 565.

Plaintiff in error has come into our state, set itself up in business, and is carrying on business within the state as distinguished from corporations which incidentally engage in business in the state. It is not taxed for the privilege of sending its agents into other states to buy ore, nor is it taxed for the privilege of buying ore shipped to it from outside. The transaction of buying ore outside of the state or within the state is not taxed or licensed. If a tax were imposed upon any of the instruments or agencies required in the shipping of the ore to and fro, this would be an interference with interstate commerce. If the bills of lading were taxed, this would be invalid. But the license tax imposed under our statutes is not levied upon any of those transactions. The annual revenue license tax is imposed for the privilege which appellant enjoys of setting itself up in business in the state of Colorado, erecting its plants within its boundaries, smelting ores there, participating in the right of the protection of the laws of the state, both in reference to its property and its business transactions. It has become domiciled in the state, and for this privilege it is required to pay an annual license tax.

A saloon that buys its cordials in Italy, its wines in France, its whiskies in Kentucky, its beer in St. Louis, and its bar fixtures in Chicago, and receives them all in Denver and carries on a mercantile business throughout our western states, might just as well claim that it is engaged in interstate commerce and

refuse to pay a license for the privilege of setting itself up in Denver, and, although the license is often made so great as to be a serious burden upon the business, its imposition has never been held to be a violation of the federal Constitution.

Waters Pierce Oil Co. vs. Texas, 177 U. S., 28.

Judson on Taxation, section 158.

Penn. vs. Knight, 192 U. S., 21.

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S., 611.

There are several important decisions illustrative of the right of a state to keep a corporation out of its territory until it complies with the conditions which the state sees fit to impose upon its admission. This right to exclude is recognized by the Supreme Court of the United States in those decisions where it sustains the right of a state to impose a fee as a condition precedent to the right to file its articles of incorporation. The exercise of this right must be understood in contradistinction to the lack of authority to prohibit a corporation from coming into the state, or for the purpose of enforcing its demands for goods already sold and delivered. But where a foreign corporation comes into the state, builds warehouses for the purpose of containing its goods, and from such establishments carries on a mercantile business, then such corporation becomes an establishment of the state, and may be required, lawfully, to pay an annual license tax. It may do all its commercial business outside of the state free and untrammeled. It may buy and sell, import and export, col-

lect, sue and disburse, and the state can not restrict it in the exercise of such incidents of commerce. But when it comes into the state as a resident and seeks to set itself up in business, it must, if the state so desires it, pay an annual license tax for the privilege of carrying on intra-state business.

Chapters 4 and 5, Judson on Taxation, especially sections 147 and 183.

The Wabash Railroad, being a consolidation of companies existing under the laws of Ohio, Michigan, Indiana, Illinois and Missouri, wished to file its articles of consolidation under the laws of the state of Ohio as it had done in other states. Its capitalization was $52,000,000, and the state insisted upon one-tenth of one per cent. of the entire stock as a fee for incorporation under the Ohio law, making the sum of $52,000 as the fee. The company offered to pay $700, being one-tenth of one per cent. on the capital of $700,000, which was the capital of the Ohio corporation.

It was claimed that the $52,000 was on capital employed outside of the state, was extraterritorial in force and a burden on commerce. The Supreme Court held that it was for the state of Ohio to determine what condition it would annex to the privilege of incorporating under its laws; that the purpose of filing its articles was to secure to the consolidated company certain powers, immunities and privileges which appertain to a corporation under the laws of the state of Ohio, and that this incorporation involved no inter-

ference with interstate commerce, or taxation of property *beyond* the limits of the state.

Ashley vs. Ryan, 153 U. S., 436.

> "The foreign corporation therefore must establish a *business domicile* of some sort in the state before it can become subject as a corporation to the taxing laws of the state by reason of 'carrying on business' therein.
>
> "It may have property in the state which is taxable as property, but neither the ownership of such property nor the relation of stockholders, patent licensor, nor creditor to a domestic corporation, constitutes 'carrying on business' in the state, unless it has a business domicile in the state, a sales agency, manufacturing plant, distribution warehouse, or an interest in a domestic partnership. It must in some way establish a place within the state for doing some part of its corporate business."

Judson on Taxation, section 181.

Many decisions have been rendered by this court sustaining a license tax on corporations, railroads, telegraph companies, confined exclusively to that portion of its business carried on within the state. The leading case on this proposition is

Postal Tel. Co. vs. Charleston, 153 U. S., 692.

Judson on Taxation, chapter 7.

In the opinion in this case, the Supreme Court of the state of Colorado ruled that section 65 did not

levy a tax upon the interstate commerce of plaintiff in error. The language of the court in reference to this objection is as follows:

> "The tax is not levied upon any article that is imported into, or exported from, this state, nor is any instrument of interstate or foreign commerce taxed, nor is any burden placed upon that commerce in the sense in which that term is used in the federal Constitution. If there is any burden at all, it is only incidental and such as results from all legitimate taxation."

The actual operation of this statute does not cast any burden upon the interstate commerce business of the smelter. Under this interpretation, if the company refuses to pay the tax, the operation of its smelters within the state of Colorado must cease, and this is not a violation of any principle of the federal Constitution.

The presumption is that the state intended to enact a law within its powers.

Grenada vs. Bragden, 112 U. S., 269.

If a statute is susceptible of two constructions, that one will be adopted which will avoid unconstitutional acts.

Parsons vs. Bradford, 3 Pet., 433.

If the court can give it a reasonable interpretation, so that its application will not interfere with

interstate commerce, then the court should adopt that construction.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

Osborne vs. Florida, 164 U. S., 650.

Noble vs. Mitchell, 164 U. S., 368, 372.

An annual license tax of $100 for each main line of railroad to and from other points in the state of Alabama was sustained.

City of Anniston vs. S. Ry. Co., 112 Ala., 557.

The Supreme Court of the United States has sustained an annual license tax imposed upon railroads, limited to the domestic business of such corporation.

Penn. vs. Knight, 192 U. S., 21.

The application I wish to make of this decision concerning the power of a state to tax even railroads and telegraph companies is this: Such a statute does not interfere with any business which an agency of interstate commerce conducts outside of the state. It may be a burden upon the corporation engaged in such business; it may even so seriously cripple it as to embarrass it in proceeding in its interstate business, but, as a matter of fact, the commerce which it is an instrument in conducting between the states is not interfered with or obstructed.

The discussions in relation to railroads, express companies and telegraph companies show that the annual corporation license tax must bear in some manner upon commerce between the states in order

to be invalid. It is not enough that the law touches the corporation itself, the fact that it affects the agent of interstate commerce is not sufficient to render it invalid. It must touch commerce between the states in order to be unconstitutional. If we consider these statutes as applied to The American Smelting & Refining Company, on those facts as explained in the testimony, we are unable to perceive how an annual license tax imposed by our statute can be a tax on commerce between the states. If this law is invalid as to the plaintiff in error, I can not see how an annual license tax can be recovered from any corporation. It would be a very simple matter for every one of them to buy goods in other states and ship them into this state, and then sell them to citizens of other states. This would represent one phase of the business claimed to be conducted by the plaintiff in error. It would be equally as easy for these corporations to arrange to purchase in Colorado the goods shipped to it by citizens of other states, and after receiving them to sell and deliver to citizens of other states. This would be analogous to another phase of the business carried on by The American Smelting & Refining Company. It is the commerce itself that must be burdened, directly or indirectly, as, for instance, a tax upon tonnage, bills of lading, and goods themselves while in transit, a drummer, a common carrier, or the agent who promotes the business of the common carrier. The tax on the cars, the road bed, and the buildings of the railroads within the state for the purpose of carrying on business, are subject to taxation, and indirectly such a burden may seriously interfere with the business of interstate commerce; yet the tax is sustained, having too remote a bearing to be any vio-

lation of the federal Constitution. Property has always been held subject to taxation, although employed in carrying the federal mail. In every case which we have examined the distinction which the court makes is, Does the tax bear upon commerce itself, or upon such an agency of commerce? This corporation refuses to pay; can it be closed down for failure to pay the tax? We will say that it can. Does this obstruct interstate commerce? So far we do not find that it is engaged in any commerce any more than the laundry that washes clothes shipped in from another state and reshipped. Laundries have been held not to be engaged in interstate commerce.

Smith vs. Jackson, 54 S. W., 981.

> "Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent, as required by the statute.
>
> "The meaning of the phrase 'to carry on,' when applied to business, is well settled. In Worcester's Dictionary the definition is, 'To prosecute, to help forward, to continue, as to carry on business.' The definition given to the same phrase in Webster's Dictionary is: 'To continue, as to carry on a design, to manage or prosecute, as to carry on husbandry or trade! The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery, and

the other party to pay for it, did not constitute a carrying on of business in Colorado.

"The obvious construction, therefore, of the Constitution and the statute is that no foreign corporation shall begin any business in the state, with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on in the state, and naming an authorized agent, residing at such principal place of business, on whom process may be served. To require such a certificate as a prerequisite to the doing of a single act of business, when there was no purpose to do any other business, or have a place of business in the state, would be unreasonable and incongruous."

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

"It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it can not prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the states."

Id., pages 727, 737.

The power of the state to regulate commerce confers upon the general government the control of inter-

course between persons of different states; the transportation of articles between points in different states, and does not permit the state to pass any law which would tend to burden such intercourse or traffic. This relates to correspondence between the different states, the transportation and means of transportation, but it does not take away from the states the power to control the operation of manufactures; as, for instance, steel works, car shops, mills, smelters and reduction works, and it is immaterial that in the prosecution of the business of such manufactures it becomes necessary for the corporation to participate in interstate commerce. So far as the transactions involve commerce, the state can not interfere with those powers of the factory. The remark, therefore, of Judge Woods in Cooper Manufacturing Co. vs. Ferguson, supra, is worthy of consideration:

> "The prohibition against doing any business can not, therefore, be literally interpreted."
>
> Cooper Mfg. Co. vs. Ferguson, supra, pages 734, 739.
>
> Postal Tel. Co. vs. Adams, 155 U. S., 700.

A tax on intra-state business is valid.

> Postal Tel. Co. vs. Charleston, 153 U. S., 692.
>
> Pacific Express Co. vs. Seibert, 142 U. S., 339.
>
> Osborne vs. Florida, 164 U. S., 650.

Maine vs. Grand Trunk Ry., 142 U. S., 217.

Diamond Match Co. vs. Ontonagon, 188 U. S., 82.

Diamond Glue Co, vs. U. S. Glue Co., 187 U. S., 611.

CONCLUSION.

The authorities abundantly establish that the proper construction of section 65 is to view it as levying a tax on the business of the corporation. There is no lack of "due process of law" in the imposition of this tax, or the enforcement of the statute in this case. The American Smelting and Refining Company is not a citizen of the United States within the meaning of the fourteenth amendment and is not entitled to the protection of the clause which prohibits any state from passing or enforcing any law which abridges the privileges or immunities of any citizen of the United States. The assignment of error which relates to the alleged violation of the fifth amendment, has no application. The fifth amendment is not a limitation upon the power of the states.

We believe sections 64 and 65 afford a reasonable classification of corporations for the purpose of revenue.

We do not concede that there is any valid objection to section 66. It is the duty of a subject to support the government before it has a right to insist on its aid or protection. But it is urged that individuals are not required to pay this tax as a pre-

requisite to their right to sue, and that there is no reasonable ground for discriminating against corporations, when the latter desire to ask the aid of the courts. However, we submit that the question is not involved in this suit, because this is a direct proceeding in the nature of a *quo warranto*, testing the right of the corporation to continue its business without complying with the revenue laws of the state.

This is the course pursued in this proceeding, and the defendant has been called upon to show cause why it should not cease to do business in the state of Colorado until it has paid the tax. It has answered, setting up that sections 64 and 65 are unconstitutional because they are in violation of the principles of uniformity enjoined by the Constitution of the state of Colorado; that there is unjust discrimination manifest in taxing a domestic corporation at one rate and foreign corporations at a greater rate; that there is unjust discrimination as between different kinds of foreign corporations, depending upon the face value of their stock; that this company is engaged in interstate commerce and is not subject to a state license tax. It also alleges that these sections impair the obligation of the contract existing between it and the state of Colorado. If it has not made good these objections, then the tax is valid and the company should pay it; if the method adopted by the legislature of Colorado to enforce prompt payment is objectionable and invalid, those provisions can only be passed upon when a private defendant seeks to give them force and effect. In this instance, we have chosen to rely upon the power of the sovereign state to inquire into the right of this corporation to do business in violation of a valid section of the revenue act; if it has

failed to give any good and sufficient answer, the judgment of the state court, forfeiting its right to do business in the state until the tax is paid, should be affirmed.

The proceeding outlined in sections 67 and 68 are not in violation of "due process of law," because there is no inherent right in a taxpayer to have his day in court before he can be made to forfeit his property or right to do business for failure to pay. In the case of a tax on property, some appropriate opportunity to be heard is required, or else the law has generally been held unconstitutional. But where the tax is in the nature of a license tax, levied for revenue purposes, the right to conduct the business becomes a privilege and a person has not the constitutional right to carry it on unless he first pays the tax. In case of refusal, the remedy is summarily to stop the business.

The method of collecting a tax is always summary, and a right to be heard in court is not indispensable. Corporations, trades, professions and franchises are as much subject to taxation as property, and when they are taxed as a condition precedent to their enjoyment, failure to pay the tax forfeits the right of enjoyment. The tax is an arbitrary amount; the valuation of the business has nothing to do with its payment; there really is nothing concerning which the corporation can be heard.

If sections 66, 67 and 68 are invalid, still sections 64 and 65 may stand, because they create the obligation to pay a tax that can be enforced in the nature of an action in debt.

Sections 67 and 68 are not objectionable. They relate to the notice required to be given and extend to the corporation an opportunity to remove the pen-

alty it has incurred by failure to pay the tax. The real objection goes to sections 65 and 66. The enforcement of the latter section, we submit, is not involved in this action.

Section 65 makes the payment of this tax a condition precedent to the right to do business; therefore, an action in the nature of a *quo warranto* in the name of the people of the state of Colorado is an appropriate remedy—to enforce the section and take away the right of the company to do business until it is willing to submit to this particular revenue statute.

Lumber Co. vs. Ward, 30 W. Va., 43.

It is, therefore, respectfully submitted that the judgment of the Supreme Court of the state of Colorado should be affirmed.

Respectfully submitted,

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APPENDIX A.

STATE LICENSE ON CORPORATIONS

"Sec. 64. In addition to all other fees and taxes now provided for by law, every corporation which has heretofore obtained, or which shall hereafter obtain, a charter or certificate of incorporation from this state, and having a capital stock of $25,000.00 or over, shall pay, on or before the 1st day of May of each year, or at the time of obtaining such charter or certificate of incorporation, and on or before the 1st day of May of each year thereafter, as the case may be, an annual state corporation license tax to the auditor of the state of Colorado, as follows:

"Two cents upon each one thousand dollars of its capital stock.

"Sec. 65. Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the state of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this state, pay annually, on or before the 1st day of May of each year, or at the time of obtaining such right or privilege, and on or before the 1st day of May of each year thereafter, as the case may be, to the auditor of the state of Colorado, a state license tax as follows:

"Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations, the par value of whose shares of stock is less than one dollar per share, they shall pay as

such tax at the rate of two and one-half cents per thousand shares.

"Sec. 66. Every corporation which shall have failed to pay the tax provided for in sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this state until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this state, until such tax is paid.

"Sec. 67. It shall be the duty of the state auditor, immediately on the passage of this act and on or before the 1st day of February annually hereafter in each year, to notify every corporation liable to tax hereunder, of the time of payment of such tax, and such notice shall contain a copy of this section and of sections 64, 65 and 66.

"Sec. 68. It shall be the duty of the state auditor, within thirty days after the 1st day of every May, to notify in writing, all such corporations as have forfeited their charters or their rights to do business within the state of Colorado, under the provisions of the foregoing sections, and any such corporation which shall, at any time after such notice pay to the auditor the tax payable on or before the 1st day of May of that year and ten per cent. of said tax in addition thereto, for every six months or fractional part of six months, from the date of said notice, shall thereupon be relieved from the forfeiture of its charter or

right to do business within the said state, by reason of such failure.

"Nothing in sections 64, 65, 66 and 67 shall be construed as imposing a license tax upon corporations chartered strictly for educational, social, literary, scientific, religious or charitable purposes, or ditch or irrigation corporations whose property is exempt by law from taxation, or upon charters incorporating Masonic lodges, Odd Fellows' lodges, or other fraternal or benevolent societies. But insurance companies not capitalized shall pay a yearly tax of one dollar per thousand on the gross premiums collected in this state, in addition to the other taxes and fees provided by law; Provided, That nothing in sections 64, 65, 66 and 67 contained shall be construed as applicable to organizations which conduct their business as fraternal societies on the lodge system, or which limit their certificate holders to a particular secret order or fraternity.

"The auditor of the state shall, within thirty days after the receipt of any moneys collected by him under the foregoing sections, whether paid under protest or not, pay the same into the general treasury of the state, and shall take, at the time of such payment, a receipt or receipts from the state treasurer, showing upon its face the exact amount of such moneys paid to said treasurer, and on what account and from what source the same was derived. The fees provided for in sections 64 and 65 are in addition to the other fees and taxes provided for by law.

"Sec. 69. For the purpose of the foregoing tax the fiscal year for basing such tax shall begin with May 1 of each year, and end with April 30 of the suc-

ceeding year, and that the foregoing prescribed tax shall apply to each fiscal year, or fractional part thereof."

Page 73, Revenue Act of Colorado, adopted in 1902.

APPENDIX B.

VALUATION OF INTANGIBLE PROPERTY.

Section 61. In arriving at the value of the property owned by any corporation, foreign or domestic, not only its tangible property, whether it be within the state, or partly within and partly without this state, shall be looked to by the assessor and state board of equalization, but its intangible property, such as special privileges, rights of way, franchises, contract rights and obligations shall be considered, that is to say: The entire business, plant or enterprise, of such corporation shall be valued as a unit, and every element, subject or consideration wherein the use is in inseparable combination with a whole, of which it forms a part, and which gives to the corporation property an added value for the purposes of income or sale, shall be considered in fixing the value for taxable purposes. Nothing herein contained shall be deemed to interfere with the provision of this act relating to the assessment and taxation of the properties of corporations doing business in two or more counties.

Section 62. For the purpose of arriving at the total value of any business plant or enterprise, and of the intangible property to be assessed, the assessor shall require the party making such return, or any other persons, to give information under oath as to the total value of said business, and any other information that such assessor may deem necessary to enable him to arrive at the value of the plant as a whole. In case of failure or refusal of the party making such return to give to the assessor such information as may be required, such assessor may, upon petition to the County

or District Court or the judge thereof, setting forth the refusal of said party or his failure, as the case may be, to answer questions propounded, cause said party to be cited to appear before said court or judge, and there be examined at length as to all matters required in arriving at a proper value of said plant or business, and said court or judge shall have full power to punish, as a contempt, any failure in such case to give the required information.

Section 63. Every corporation, doing business and owning property in two or more counties of the shall, except as otherwise provided in this act, in ion to the other property required by this act to listed, make out and deliver annually to the auditor of state its schedule and sworn statement setting forth particularly,

First—The name and location of the principal office of the company or association.

Second—The amount of the capital stock thereof, as authorized by the charter or articles of association, and the number of shares into which such capital stock is divided.

Third—The amount of capital stock paid in, and the amount of its bonds outstanding, if any.

Fourth—The average market value of such stock and bonds during the twelve months next preceding the date of such report, or, if the same be without market value, then the actual value thereof.

Fifth—The total indebtedness of such corporation, except indebtedness for current expenses, excluding from said expenses the amount paid for the purchase or improvement of property.

Sixth—The value and location of all its property.

Seventh—The gross earnings of such corporation during the twelve months ending with the thirty-first day of March next preceding.

Eighth—The net earnings of said corporation during the same period.

Ninth—The difference in value between all tangible property and the capital stock, and the mortgage or bonded indebtedness.

Tenth—The name and particular description of each franchise of privilege owned or enjoyed by such corporation, and the value thereof.

Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of state, and the auditor shall prescribe and deliver to each county assessor such forms, together with the blank forms for such returns of corporation stock and properties, as hereinbefore prescribed. Every such return shall be sworn to by the president or other proper accounting officer of the corporation, and the state auditor shall on or before the fifteenth day of July in each year transmit a copy of such returns to the assessor of each of the several counties interested in such assessment.

In case any corporation shall wilfully fail or refuse to make such report and return, such corporation shall forfeit and pay the sum of one hundred dollars, and one hundred dollars in addition thereto for each day during which such report is delayed beyond the first day of June, to be sued for and recovered in any proper form of action, in the name of the people of the state of Colorado on the relation of the board of county commissioners of the proper county. Such penalty, when collected, shall be paid into the county treasury, and it shall be the duty of the board of

county commissioners of the county to enforce the provisions of this section.

In respect to every corporation having property and doing business in two or more counties of this state, only other than those assessable by the state board of equalization, the county assessor shall assess that part of the intangible property of any such corporation in the proportion that its tangible property in the county bears to its tangible property wherever situate.

Every corporation other than those assessable by the state board of equalization, having property and doing business in two or more counties in this state, and also having property and doing business outside of this state, shall also comply with the provisions of this section; and in respect to all such corporations the assessor shall assess that part of the intangible values of any such corporation in the same proportion that the tangible property in his county bears to tangible property of the corporation wherever situate.

The tax upon the intangible property of every such corporation shall be a lien upon the tangible property of such corporation wheresoever situate, and if any such tax is not paid when the same ought to be paid, the treasurer of the county where occurs the failure to pay such tax shall collect the said tax in the same manner and with like effect as if the same were delinquent taxes against tangible property.

Session Laws of 1902, page 70.

APPENDIX C.

"No corporation, joint stock company or association, incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint stock stock company or association, of all fees and taxes prescribed by law to be paid to the secretary of state, and every such corporation, joint stock company or association shall pay to the secretary of state for each such certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

3 Mills' Annotated Statutes (Rev. Supp.), section 491i.

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